

DATE: March 24, 2004

TO: DNR Shoreland Zoning Program staff

FROM: Linda Meyer – Bureau of Legal Services

SUBJECT: Wisconsin Supreme Court Decision in *Ziervogel v. Washington County BOA*

On Friday, March 19, 2004, the State Supreme Court issued a 5 to 0 decision in the case of *State ex rel. Ziervogel v. Washington County Board of Adjustment*. (Two members of the Court, Justice Abrahamson and Justice Bradley, did not participate in the case because they had disqualified themselves.) In the *Ziervogel* opinion, the Court decided that the “no reasonable use” standard for measuring “unnecessary hardship” when a property owner requests a variance, that was applied in the Supreme Court’s 1998 decision in *State v. Kenosha County*, should only be applied to use variances. The Court declared unenforceable a provision in Washington County’s shoreland zoning ordinance, which defines “unnecessary hardship” in all shoreland variance cases as the situation where there is “no reasonable use in the absence of a variance.”

In the *Ziervogel* opinion, the Supreme Court quotes language from its 1976 decision in *Snyder v. Waukesha County Zoning Board of Adjustment* to define “unnecessary hardship” as that term is used in the statute that gives county boards of adjustment the authority to issue variances, section 59.694 (7)(c), Wis. Stats.:

“When considering an area variance, the question of whether unnecessary hardship . . . exists is best explained as ‘whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.’ ” *Snyder*, 74 Wis. 2d at 475 (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972)

The Court’s opinion in *Ziervogel* goes on to clarify that whether this area variance standard is met in individual cases depends upon a consideration of the purposes of the zoning restriction in question and the effect of a variance on those purposes.

### Facts of the Case

The plaintiffs in the *Ziervogel* case (Richard Ziervogel and Maureen McGinnity) own a 1.4 acre parcel of land with 200 feet of frontage on Big Cedar Lake in the Town of West Bend in Washington County. They have an existing 1600 square foot home with a legal nonconforming setback of 26 feet from the ordinary high-water mark on that property, which they have used as a summer home. A public road divides their lot and the portion of the lot on the opposite side of the road from the lake is in a floodplain. There is no location on the lot on which to build a home that would be setback 75 feet from the ordinary high-water mark of the lake.

The plaintiffs sought a variance to construct a 1200 square foot addition to the home. They want to add an additional story within the footprint of the existing home in order to convert it to a year-round residence. The Washington County Board of Adjustment denied their variance request on the grounds that the plaintiffs already had reasonable use of their property without a variance. Both the Washington County Circuit Court and the Court of Appeals affirmed the Board's decision.

However, the Supreme Court reversed the Court of Appeals decision and concluded that the matter should be remanded to the Board of Adjustment for a determination as to whether the area variance standard described in the *Snyder* decision is satisfied in this case.

### The Significance of the Decision

Washington County (and the State of Wisconsin) argued before the Supreme Court in the *Ziervogel* case that it was not necessary to create a distinction between area variances and use variances in order to distinguish the Kenosha County decision (which involved a shoreland zoning variance) from cases where variances are sought from other kinds of zoning ordinances – because the purposes of other kinds of zoning ordinances are so different from the purposes of shoreland zoning.

However, the Court has decided that a distinction between area variances and use variances should be made. In *Ziervogel*, the Court finds “the perpetuation of a single, highly-restrictive ‘no reasonable use of the property’ standard for all variances unworkable and unfair,” and the Court chose to solve this problem by establishing a new standard for area variances.

One positive result of the *Ziervogel* decision will hopefully be that it will now be clear to local boards of adjustment that they are not required to apply a “no reasonable use” standard to cases in which they are asked to approve of relatively minor variances from dimensional standards in general zoning ordinances. The Supreme Court has made it clear that they are able to apply the “unnecessarily burdensome” test from the *Snyder* case in deciding whether a property owner will suffer unnecessary hardship in situations where a property owner is requesting an area variance.

Another positive aspect of the *Ziervogel* decision is its emphasis on the board of adjustment's responsibility to look at the impacts of a proposed variance on the purposes behind the zoning restriction from which a variance is sought. It is because of this emphasis that the DNR believes that the Supreme Court's decision in the *Ziervogel* case will not change the outcome in the vast majority of shoreland and floodplain zoning cases where a variance is sought.

In *Ziervogel*, the Supreme Court states:

“The board must determine whether a hardship unique to the property has been demonstrated and whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied.” *Ziervogel*, ¶ 34.

This emphasis on the purpose of the zoning restrictions means that it will continue to be very difficult to obtain a variance from shoreland and floodplain zoning requirements because of the important purposes that these ordinances serve.

cc: Richard Wedepohl – WT/2  
Carmen Wagner – WT/2  
Toni Herkert – WT/2  
Gary Heinrichs – WT/2  
Dave O'Malley – WT/2  
Jim Christenson – LS/5  
Rick Prosis – LS/5  
Tom Steidl – LS/5  
Marcia Penner – LS/5  
Laurel Steffes – CE/6  
Paul Heinen – AD/5